



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 14, 1996

Ms. Elizabeth Bourbon
Staff Attorney
Legal Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR96-0962

Dear Ms. Bourbon:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 37886.

The Texas Natural Resource Conservation Commission (the "commission") received two requests for "a full copy of each permit/license/authorization/exemption application that has been filed with TNRCC on the proposed Alta Mesa In Situ Uranium Mine Project."¹ You state that one of the parties whose material has been requested, COGEMA Mining, Inc. ("COGEMA"), objects to release of its requested information.² Accordingly, pursuant to section 552.305 of the Government Code, this office informed COGEMA of the requests and of its obligation to submit arguments as to why any exceptions to required public disclosure apply. COGEMA replied, claiming that the requested information is excepted from disclosure under sections 552.101, 552.104, 552.110, and 552.113 of the Government Code. We have considered the exceptions claimed and have reviewed the documents at issue.³

¹You state that the requestor clarified his request to seek application materials filed by Chevron, Inc., Total Minerals Corporation, or COGEMA Mining, Inc.

²As no exception has been claimed with respect to the other requested information, we assume that this information either has been or will be released to the requestor.

³The requestor claims that sections 5.174 and 5.175 of the Texas Water Code make the requested information public. However, there has been no explanation as to how these water code provisions apply to the requested uranium mining applications.

Section 552.110 excepts from disclosure trade secrets or commercial or financial information obtained from a person and confidential by statute or judicial decision. COGEMA argues that portions of its applications are protected under the second prong of section 552.110.⁴ In Open Records Decision No. 639 (1996), this office established that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act in applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. "To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted).

COGEMA claims that it actually faces competition against other companies for the same uranium ore deposits. COGEMA has also supplied the names of competitors and evidence that they are permitted to engage in some form of uranium mining in Texas. Further, COGEMA argues:

Selling uranium on the open market is highly competitive. The going price rises and falls according to supply and demand. As with any other market, the seller's cost of getting product to the marketplace must be lower than the price for which that product sells in order for that seller to make any profit. All uranium mining companies sell their product in the same marketplace. . . . COGEMA has already invested approximately \$4.5 million in the Alta Mesa project. . . . In so doing, the company has almost completely prepared the site for mining, leaving actual construction on the surface facilities as the only major investment left. The subsurface geology work, the location and amount of ore in that substance, and the most efficient manner of extracting uranium are all essential to any mining venture, and they have all been performed by COGEMA. Disclosure of these documents would hand over to a competitor all that critical and essential data, thereby allowing that competitor to mine the site at only a fraction of the investment. That, in turn, would allow that competitor to bring the uranium to the marketplace at grossly (and unfairly) reduced cost, which would directly undercut COGEMA's competitive position in the marketplace. [Emphasis in original.]

⁴We note that COGEMA claims that these same portions are protected under the first prong of section 552.110 as trade secrets.

We conclude that the commission must withhold the information set out on Exhibit "A" attached to this ruling under section 552.110.⁵

For information to be protected under the second prong of section 552.110, its release must cause substantial harm to the competitive position of the person from whom the information was obtained. One document was previously provided to the requestor.⁶ As this document has already been released, we fail to seek how COGEMA's competitive position could be harmed by a second release of this same information. Therefore, the commission may not withhold the Alta Mesa Project In Situ Mining Uranium Mining Permit Application and Production Area Authorization dated June, 1995.⁷

Similarly, we do not believe that release of Appendices A, B, and D to volume II of the Class I Injection Well(s) Application would harm COGEMA's competitive position. These documents all indicate that they are filed with county clerks and have been recorded in deed records or were filed with the Texas Secretary of State. Consequently, these documents are open to public inspection at any time. Therefore, these documents may not be withheld under section 552.110.

Section 552.301(b)(3) requires that governmental bodies submit to this office either the specific information requested or, if the information is voluminous, a representative sample of the specific information requested. On February 28, 1996, we asked the commission for the requested information. The commission did not submit to this office copies of the Radioactive Material License Application (originally submitted September, 1992 - Update July, 1995).

Chapter 552 of the Government Code places on the custodian of public records the burden of establishing that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). Your request for an open records decision remains incomplete. Without this particular information requested from you, this office is unable to evaluate the exceptions raised as to those documents. Consequently, we find that the

⁵The requestor claims that he has a special right of access to the requested information because a contract gives him access to this information. COGEMA has responded, stating that it has provided the requestor with all information to which he is entitled under the terms of this contract. This office may not construe contracts. See, e.g., Attorney General Opinions DM-192 (1992); JM-697 (1987); Open Records Decision No. 621 (1993). Accordingly, this office cannot determine whether the agreement gives the requestor a special right of access to the requested information.

⁶Although the requestor claims that he previously received two documents that he is now requesting, COGEMA claims that the September, 1992 document received by the requestor was updated and that COGEMA seeks to withhold the updated version of that document.

⁷The same is true under a trade secret analysis. For something to qualify as a trade secret, it must be secret. *Gonzales v. Zamora*, 791 S.W.2d 258, 264 (Tex. App.--Corpus Christi 1990, no writ) (to be trade secret, information must not be commonly known in industry or readily ascertainable); *Zoecon Industries v. American Stockman Tag Co.*, 713 F.2d 1174, 1178 (5th Cir. 1983) (applying Texas law) (same).

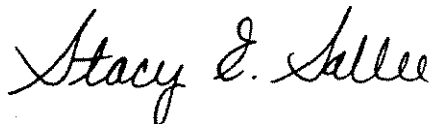
commission has not met its burden under sections 552.301 through 552.303 of the Government Code and that the information is presumed to be public. Open Records Decision No. 195 (1978). In the absence of a demonstration that the information is confidential by law or that other compelling reasons exist as to why the information should not be made public, you may not withhold this information. *Id.*; see also Gov't Code § 552.352 (distribution of confidential information is criminal offense).

We now address the other claimed exceptions as to the rest of the requested information. Section 552.104 excepts information that, if released, would give advantage to a competitor or bidder. The purpose of this exception is to protect the interests of a governmental body in competitive bidding situations. See Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. As the commission did not claim that section 552.104 excepts the requested information from disclosure and as the exception does not protect COGEMA's interests, section 552.104 will not except the requested information from disclosure.

Section 552.113(a) of the Government Code excepts from disclosure "geological or geophysical information or data, including maps concerning wells, except information filed in connection with an application or proceeding before an agency." Here, the information requested was filed in connection with an application or proceeding before an agency. Although COGEMA claims that the information had been "withdrawn," the information had been filed and was still information "collected, assembled, or maintained" by the governmental body at the time the request for information was made. Therefore, the information was subject to the provisions of chapter 552 of the Government Code at the time the commission received the request for information. Therefore, we conclude that this information was filed in connection with an application or proceeding before an agency and is consequently not excepted from disclosure under section 552.113.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in cursive script that reads "Stacy E. Sallee".

Stacy E. Sallee
Assistant Attorney General
Open Records Division

Ref.: ID# 37886

Enclosures: Submitted documents

cc: Mr. George E. Tanner
President
Mestefia, Inc.
700 NationsBank North
500 North Water Street
Corpus Christi, Texas 78471
(w/o enclosures)

Ms. Jennifer Riggs
Attorney at Law
602 Harthan Street, Suite A
Austin, Texas 78703
(w/o enclosures)

Mr. Kenneth Ramirez
Bracewell & Patterson, L.L.P.
100 Congress Avenue, Suite 1900
Austin, Texas 78701-4052
(w/o enclosures)

Exhibit "A"

Document	Volume	Sections/Pages
Class I Injection Well(s) UIC Application, July 1995 ("Permit Applications to Dispose of Waste in Two Class I Injection Wells)	I	Section 1.0, pages 1-4; plate 1-1
		Section 2.0, pages 2-1 through 2-2; plates 2-2, 2-3; tables 2-1, 2-2
		Section 3.0, pages 3-1 through 3-17; tables 3-1, 3- 4, III.A, III.B, III.D
		Section 4.0, pages 4-1 through 4-6; plates 4-1, 4-2; tables 4-1, 4-2, 4-3
		Section 8.0, pages 8-1 through 8-39; plates 8-1 through 8-4; tables 8-1, 8-2; figures 8-1 through 8-26
		Section 9.0, pages 9-1 through 9-4
		Section 10.0; pages 10-1 through 10-37; table 10-1; figures 10-1 through 10-5
	II	Appendix E
		Appendix K
	III	Appendix K (cont'd)
		Appendix L
		Appendix M
Registration for Standard Air Quality Exemption		Entire application, including figures 1.2, 16.1, 16.3, 16.4, 16.5, 16.6, 16.7; attachments 2, 3; figure 15- 1
EPA Aquifer Exemption		Entire application
Secondary Groundwater Compliance Report		Entire application including figures 1, 2, 3 and report entitled "Geotechnical Investigation and Monitor Well Installation, Alta Mesa Project, Brooks County, Texas"